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No. 03-814

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner's formulation of the issue is incorrect. The questions presented by the petition are as follows:

1. Whether the First Circuit correctly held that a barge that is equipped with a dredge, has no effective means of propulsion, no living quarters, and is used only as a platform for dredging the ocean floor is not a vessel within the meaning of the Jones Act?

2. Whether the petitioner has failed to carry his burden of providing a compelling reason for this Court to disturb the First Circuit's decision and legislate a new definition of "vessel" for purposes of the Jones Act?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

The respondent Dutra Construction Company, Inc. is a California corporation and wholly owned subsidiary of The Dutra Group, a California corporation.

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STATEMENT OF THE CASE

The petitioner's statement of the case is incomplete and misleading because it does not mention the following undisputed facts:

- The Superscoop had no sleeping or living quarters.

- The Superscoop has navigational lights because the Coast Guard requires any work platform, stationary or otherwise, located in any part of Boston Harbor to maintain lighting conforming to Coast Guard requirements for visibility and color. Dutra was required to put lights on pipelines, ranges, and markers. The Superscoop's lights were unrelated to navigation.

- The Coast Guard issued the Superscoop a Certificate of Inspection. Pursuant to the Certificate, when the Superscoop is being towed to a job site no persons are allowed to be on it. When the Superscoop is on the ocean, it may only be moved if it is unmanned. The only time the Superscoop is being "navigated," no one is allowed on it.

- The global positioning system on the Superscoop has never been used to "navigate a planned route." The Superscoop cannot propel itself more than a few feet. Any route planning is done by the tug boat assigned to transport the dredge to the next work site. The global positioning system is used only to pinpoint the precise spot where the dredge's bucket is to scoop up sediment. While dredging, the Scoop inches along digging a ditch and is at all times attached to the harbor floor. The Superscoop will be moved a short distance approximately six times during a twenty-four hour period, unless the dredging is slowed due to ledge. Each move takes approximately five minutes. The total distance moved in a twenty-four hour period is

thirty to fifty feet. At the time of the petitioner's accident, the Superscoop was fully anchored and stationary.

- During its stay in Boston the Superscoop's sole job was to dig the trench. It remained at this one location a short distance from the East Boston/South Boston shore.

- The petitioner first set foot on the Superscoop after it had arrived in Boston Harbor. This was the only time he had ever worked for Dutra. He was not an employee of Dutra and had no ties to the Superscoop when the dredge was transported to Boston. His employment with Dutra was scheduled to end before the Superscoop left Boston.

- The petitioner fell through an open hatch after being warned that the scow was to be moved. The scow was moved from one side of the Superscoop to the other before the accident occurred, placing the petitioner on further notice that it was necessary to hold on. The petitioner was aware that the railing around the open hatch had been removed in order to replace the engine upon which the petitioner was working.

REASONS FOR DENYING CERTIORARI

I. THE FIRST CIRCUIT'S APPROACH TO DETERMINING "VESSEL" STATUS UNDER THE JONES ACT IS WIDELY FOLLOWED.

The petitioner correctly points out that there is disagreement between the circuits as to what constitutes a "vessel" within the meaning of the Jones Act. But that is not particularly surprising. The statute does not define the key terms "seaman" or "vessel." Disagreement between courts has been a hallmark of Jones Act jurisprudence for

many years. This Court acknowledged this reality in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) without apparent concern, noting that differences between lower courts as to Jones Act construction represented "simply different ways of getting to the same basic point. . . . " *Id.* at 369-370.

What the petitioner does not mention but that should be emphasized is that the First Circuit's standard on this question, first adopted in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (CA1 1992), *cert. denied*, 506 U.S. 827 (1992) and reaffirmed in the opinion below, *Stewart v. Dutra Const. Co., Inc.*, 230 F.3d 461 (CA1 2000) (*Stewart I*), is part of an opinion that has been cited with approval by this Court, and is a framework that is widely followed by what may be a majority of jurisdictions around the country to have considered the question. *See Chandris*, 515 U.S. at 373; *Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 548 (CA6 1994) (following *DiGiovanni*); *Katheriner v. UNISEA, Inc.*, 975 F.2d 657, 661 (CA9 1992) (relying on *DiGiovanni*); *Gipson v. Kajima Eng. and Const. Inc.*, 972 F.Supp. 537, 542 (C.D. Cal. 1997) (following *DiGiovanni*); *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F.Supp. 1260, 1263-64 (S.D. Miss. 1994) (following *DiGiovanni*); *Taylor v. Cooper River Const.*, 830 F.Supp. 300, 302-304 (D.S. C. 1993) (following *DiGiovanni*); *Newsom v. Continental Grain Co.*, 820 F.Supp. 1187, 1189 (D. Minn. 1993) (citing *DiGiovanni* with approval); *Johnson v. ADM/Growmark River Sys., Inc.*, 295 Ill. App. 3d 436, 442-44, 693 N.E.2d 447, 480-82 (Ill. App. 1998) (citing *DiGiovanni* with approval); *Leggett v. Sovran Leasing Corp.*, 909 S.W.2d 664, 665-67 (Mo. 1995) (citing *DiGiovanni* with approval); *Spears v. Kajima Eng. &*

Const'n, Inc., 101 Cal. App. 4th 466, 475-78 (2002) (following *DiGiovanni*); *Gault v. Modern Continental/Roadway Const'n Co.*, 100 Cal. App. 4th 991, 1000-1002 (2002) (following *DiGiovanni*).

II. THE FIRST CIRCUIT'S DECISIONS IN *DIGIOVANNI* AND *STEWART I* ARE NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

A. *Stewart I* Does Not Contradict This Court's LHWCA Decisions.

This argument by the petitioner is an effort to create an issue where none exists. The petitioner does not identify a single specific conflict between a decision of this Court and *Stewart I*. Moreover, in framing this point the petitioner invokes the First Circuit's decision on the LHWCA aspect of the case (*Stewart II*), as to which the petitioner does not even seek review in this Court.

The petitioner fails to cite a single case in which this Court grappled with the implications of the exclusivity of the Jones Act and the LHWCA. While vessel status is a prerequisite for coverage under the Jones Act, it is not a requirement for protection under the LHWCA. Under the LHWCA the term "employee" means any person engaged in maritime employment, including any longshoreman and any harbor worker. 33 U.S.C. § 902(3). Congress intended the coverage under the LHWCA to be broad. Vessel status is a nonissue for those seeking coverage under the LHWCA.

As is the case in most LHWCA claims, in *Stewart II* whether the Superscoop was a vessel was not disputed and thus a nonissue in determining coverage under 33 U.S.C.

§ 905(b). It does not follow that the term vessel must have precisely the same meaning in both contexts. Like "seamen" the word "vessel" has a variable meaning in law applicable to the particular statute to which the legislature applied it. *See* Martin J. Norris, *The Law of Maritime Personal Injuries*, Chapt. 4 (4th ed. 2003). "Vessel" and "seamen" are given varying definitions in a number of statutes. For example, in *Presley v. Vessel Caribbean Seal*, 709 F.2d 406 (CA5 1983) scientific personnel were considered seamen under the general maritime law but not under the Jones Act. The Court held that 45 U.S.C. §§ 433 and 434 divest an oceanographic research vessel of its status as a vessel only for Jones Act purposes, but it remains a vessel for other purposes, including the warranty of seaworthiness.

In *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (CA5 1989) the Fifth Circuit held that an employee can be a "nonseamen" under the meaning of the Fair Labor Standards Act even if entitled to seamen status under the Jones Act. The Court wrote: "It is well established that the term under the two acts has different independent meanings." *Id.* The tension the petitioner alleges between *Stewart I* and this Court's LHWCA decisions does not exist.

B. The First Circuit's Rule is Perfectly Consistent With This Court's *Chandris* Decision.

In *Chandris* this Court addressed the nature of the relationship that a seaman must have with a vessel in order for the Jones Act to apply. In *DiGiovanni* and in *Stewart I*, the First Circuit considered the entirely different question whether a floating platform that supports a crane or a dredge and is not capable of navigation is a

Jones Act vessel. *Chandris* and the First Circuit decisions not only are not "seriously inconsistent," they are apples and oranges. To the extent that *Chandris* and the earlier *DiGiovanni* decision overlap in their relation to the vessel issue, they are consistent. Indeed, as noted above, the *Chandris* Court cited and quoted with approval a portion of *DiGiovanni's* explication of the Jones Act vessel concept. 515 U.S. at 373.

The contention that the First Circuit's vessel standard amounts to a "snapshot" approach is specious. The First Circuit's vessel test looks at the "purpose or primary business" of the float at issue, and in particular at whether the float's business is navigation or commerce. *DiGiovanni*, 959 F.2d at 1123 (quoting *Bernard v. Binnings*, 741 F.2d 824, 829 (CA5 1984)). This approach properly focuses on the general, continuing status and activities of the float, not at some fleeting factors existing only at the instant of injury. In a broad sense, this is the same approach taken by all courts, and is far from a "snapshot" approach.

The petitioner's focus in raising the "snapshot" issue is the second part of the First Circuit's formulation, which *expands* the vessel standard for the *benefit* of injured claimants like the petitioner by granting vessel status to floats that are actually engaged in navigation at the time of injury, even if their primary business or purpose is *not* navigation or commerce. This feature of the First Circuit's formulation does not detract from the test's principal focus on the continuing status and activities of the subject float, and only *broadens* the test for the benefit of claimants. In this way, the First Circuit approach is nuanced and generous, and consonant with the need to avoid a standard

that looks "*only* at the situation . . . at the instant of injury." *Chandris*, 515 U.S. at 363 (emphasis added).

Significantly, the concurring Justices in *Chandris* opined that the Court should not ignore "the critical distinction between work performed aboard ship during a voyage – when the members of the crew encounter 'the perils of the sea' – and maritime work performed on a vessel moored to a dock in a safe harbor." *Id.* at 377. While the *Chandris* Court acknowledged the disadvantages of workers oscillating back and forth between Jones Act coverage and other remedies, it also recognized that seaman status necessarily includes a temporal element. *Id.* at 371. There will always be situations in which an employee's status changes as the nature of his employment changes. As the Court noted, "the myriad circumstances in which men go upon the water confront Courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seamen to the land-based longshoreman." *Id.* at 356.

The First Circuit recognized this in *DiGiovanni*:

> That there should be a varying status designation depending on the activity at the moment is not a novel concept. In *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 92 S. Ct. 418, 30 L.Ed.2d 383 (1971), a longshoreman who, because unloading, would have had unseaworthiness recovery under the Jones Act, per *Gutierrez*, for a ship-caused injury, was injured instead using the stevedore's equipment. Recovery was not allowed. We believe our division of responsibility to the activity equally appropriate.

959 F.2d at 1123.

In determining whether an injured employee working on an oil drilling platform was covered by the LHWCA this Court in *Herb's Welding Inc. v. Gray*, 470 U.S. 414 (1985) reasoned that "there will always be a boundary to coverage, and there will always be people who cross it during their employment." *Id.* at 426. This Court thus recognized that if the employer had been doing the same work on the same platform but on the outer continental shelf rather than state waters he would have been covered.

There are many instances in which a temporal approach should be relied upon at least in part to avoid an unfair result. This Court recognized this in *Chandris*. The First Circuit's reliance on a temporal safeguard or exception in the second part of its rule is prudent and consistent with *Chandris*.

C. This Court Has Never Recognized That Dredges are Jones Act Vessels.

The petitioner admits at the outset that this Court "does not appear to have directly addressed the meaning of the term "vessel" (in any context) since 1903." (Pet. at 5) Then, in another breath, the petitioner argues that this Court "recogniz[es]" that dredges in fact are Jones Act vessels. (Pet. at 20-22) This argument is a misleading make weight.

None of the decisions cited by the petitioner, *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), *Gianfala v. Texas Co.*, 350 U.S. 879 (1955), and *Jerome B. Grulant, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), addressed the question presented here. All three cases involved different facts and issues than those here.

In fact, in *Senko*, which petitioner considers "[m]ost directly on point," the Court clarified that "No question has been raised at any time as to whether the dredge involved here had the status of a "vessel" at the time of petitioner's injury." 352 U.S. at 371 n. 1. Further, at least three members of the *Senko* Court did *not* consider the dredge there a vessel. To the dissenting Justices Harlan, Frankfurter, and Burton, the dredge was merely an "earth-removing machine" that was afloat and occasionally pushed from place to place. 352 U.S. at 378.

Likewise, in *Gianfala v. Texas Co.*, 350 U.S. 879 (1955), this Court did not address the issue of vessel status under the Jones Act. Contrary to the petitioner's contention, the Court assumed nothing about the status of the float there. Indeed, vessel status was not raised as an issue in the circuit court cases cited in *Gianfala*. In *Gahagan Construction Comp. v. Armao*, 165 F.2d 301 (CA1 1948), also cited by the petitioner, the court did not address the question whether the dredge was a vessel, because it was not disputed. All of the decisions cited by the petitioner have nothing to do with the instant case.

III. THE PETITIONER HAS FAILED TO PROVIDE ANY COMPELLING REASON JUSTIFYING CERTIORARI.

The petitioner says that this Court should review *Stewart I* because the Jones Act seaman question is important and current jurisprudence creates "serious problems." (Pet. at 22-23) For the following reasons there is no good reason for review by this Court.

A. The Petitioner Wrongly Assumes That Intervention by this Court Will Alleviate Differences Between the Lower Courts.

Underlying the petitioner's contention is the assumption that the promulgation of a national "vessel" test by this Court will eliminate differences between the lower courts and settle disputes over Jones Act coverage once and for all. There is no rational basis for this assumption. In fact, it is highly unlikely that a national vessel standard will be uniformly interpreted and applied from circuit to circuit. The history of the law (not to mention common sense) dictates otherwise. In truth, the current differences between the lower courts stem not so much from differences between the respective courts' articulated standards as from the fact that, in constantly changing factual scenarios, the courts are interpreting and applying in different ways the same essential considerations. The black and white standards are not the issue – it is the varying perspectives of the courts. The notion that a new test created by this Court will change that is wrong.

This Court recognized the need to determine seaman status on a case-by-case basis. The *Chandris* Court reasoned:

> In defining the prerequisites for Jones Act coverage, we think it preferable to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves.

515 U.S. at 369. This Court believed that the lower courts as well as employers and maritime workers could benefit from "general principals" as to seaman status. *Id.* at 371. "As we have said, the inquiry into seaman status is of

necessity fact specific." *Id.* Even the Fifth Circuit in the often-cited case *Offshore Co. v. Robison*, 226 F.2d 769 (CA5 1959) acknowledged that any rigid test threatens to come to grief on the facts. *Id.* at 779.

The First Circuit's formulation differs from the Fifth Circuit's in deciding vessel status. Both rules, however, work to determine the real issue: whether the employee is exposed to the special hazards of going to sea. Stewart, who worked on a mostly stationary earth-removing machine and slept in an apartment in East Boston when not on duty, clearly was not.

Review of the cases cited by the petitioner indicates that the circuits are likely to arrive at different results even if forced to follow the same rule. Under the Fifth Circuit's "rule", as clarified in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998), evaluating the importance of the craft's transportation function *is the key* to determining the craft's status. *Id.* at 351. The First Circuit, if required to follow the *Manuel* rule, likely would conclude that the Superscoop's transportation function was merely incidental and unimportant and once again deny the petitioner's Jones Act claim. It is the Fifth Circuit's expansive application of the rule and not the rule itself that has led to the supposed divergence of opinion with the First Circuit. Other circuit courts have consistently held that where there has been no showing that the alleged "vessel" served a transportation function which was more than incidental to its primary purpose, summary judgment is appropriate. *See Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 547 (CA6 1997).

B. There is No Support for the Claim That the Current State of "Vessel" Jurisprudence Creates "Serious Problems."

Who says that prevailing decisional law on the definition of "vessel" creates "serious problems" for maritime workers, their employers, and their insurers? The petitioner offers no support for the proposition, and it does not stand to reason. Between the Jones Act, LHWCA, and state workers compensation schemes, maritime workers enjoy the widest range of options, protections, and rights available to personal injury claimants anywhere in the country in the event of workplace injury. The petitioner offers no evidence that extant Jones Act "vessel" precedents interfere with those benefits.

As for maritime employers and their insurers (and their attorneys), they have the benefit of extensive statutory and common law authority to guide them. To answer questions regarding whether a particular employee is a seaman or a particular float is a vessel, they need only evaluate the facts in light of the controlling decision in their circuit/state, just as they would for any legal issue (and just as they will have to do if this Court issues a national test). There is no problem here, let alone a sound basis for certiorari.

C. The Issue is Better Left to Congress.

"Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress." *Norfolk v. Shipbuilding and Drydock Corp. v. Garris*, 532 U.S. 811,

820 (2001). It is for Congress to decide the policy questions underlying the coverage of the Jones Act, not this Court. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-427 (1985); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 216 (1971). *See also* David W. Robertson and Michael F. Sturley, *Recent Developments In Admiralty Law At The National Level and In The Fifth and Eleventh Circuits*, 26 Tul. Mar. L.J. 193, 205-206 (2001) (acknowledging the ascendancy of the view that maritime law should be developed by Congress through statue).

There is no reason to make an exception to these principles in this case. If the petitioner is correct that this matter presents an issue of true national significance, it should be addressed by Congress.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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